No. 16-1221

IN THE
Supreme Court of the United States

CONAGRA BRANDS, INC.,

Petitioner,

v.

ROBERT BRISEÑO, ET AL.,

Respondents.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Ninth Circuit

PETITIONER'S SECOND SUPPLEMENTAL BRIEF

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Having acknowledged a circuit conflict, Plaintiffs have always chained their hopes of defeating certiorari to an argument of last resort: in light of the supposed "growing consensus" against ascertainability (Supp. BIO 3), the "conflict is likely to resolve itself" because the Third Circuit and those on its side will reverse course (BIO 28). They now claim (Second Supp. BIO 1-3) that in *City Select Auto Sales Inc. v. BMW Bank of North America Inc.*, __ F.3d __, 2017 WL 3496532 (3d Cir. Aug. 16, 2017), the Third Circuit has done just that, retreating from its earlier views on ascertainability.

Plaintiffs are wrong. *City Select* reiterated and faithfully applied the Third Circuit's rule that a class cannot be certified without a "reliable and administratively feasible means of determining class membership." *Id.* at *4. In doing so, it made clear that classes like the ones certified here—with *millions* of absent class members, identifiable (if at all) only after countless mini-trials—cannot be certified. In other words, the Third Circuit held course.

City Select also proves—with *Sandusky Wellness Center, LLC v. ASD Specialty Healthcare, Inc.*, 863 F.3d 460 (6th Cir. 2017), *In re Petrobras Securities*, 862 F.3d 250 (2d Cir. 2017), and Judge Kayatta's dissent from the denial of a petition for permission to appeal in *Carter v. Dial Corp.*, __ F.3d __, 2017 WL 3225164 (1st Cir. July 31, 2017) (mem.)—that lower courts continue to disagree over what to do about unidentifiable class members.

1. Plaintiffs insist (Supp. BIO 1, 4) that *City Select* "narrow[ed] ascertainability" and "did all that it could to reject [the Third Circuit's] early articulation of the ascertainability test." Plaintiffs have badly misread the Third Circuit's opinion, which reiterated the Third Circuit's existing ascertainability doctrine and faithfully applied it to the facts of the case.

First, *City Select* said over and again that district courts must "rigorous[ly] analy[ze]" whether the plaintiff has proposed a "reliable and administratively feasible mechanism" for identifying absent class members before certifying a class. 2017 WL 3496532, at *3; *see, e.g.*, *id.* at *4. *Second*, it reiterated that the Third Circuit has repeatedly vacated class certification where the absence of adequate records made it next to impossible to identify absent class members without myriad mini-trials. *See id.* (discussing *Carrera v. Bayer Corp.*, 727 F.3d 300 (3d Cir. 2013); *Hayes v. Wal-Mart Stores, Inc.*, 725 F.3d 349 (3d Cir. 2013); *Marcus v. BMW of N. Am., LLC*, 687 F.3d 583 (3d Cir. 2012)). In this vein, it noted that "without records to identify class members or a method to weed out unreliable affidavits," "[a]ffidavits … standing alone … will not constitute a reliable and administratively feasible means of determining class membership" because the level of "inquiry" involved is too high. *Id.* at *6. *Third*, it explained that where there *are* records that guide the identification of absent class members, the presence of a few individualized (but reliable) inquiries into class member identity does not defeat certification. *See id.* at *5 (citing *Byrd v. Aaron's Inc.*, 784 F.3d 154 (3d Cir. 2015)).

Applying these principles to the facts, *City Select* simply recognized that, based on the limited discovery that the district court permitted, it was unclear whether the defendant's records could meaningfully facilitate the identification of class members. Specifically, it was unknown whether or to what extent Creditsmarts' database—which was never produced to the plaintiff—was overinclusive: it contained everyone to whom one of the disputed faxes was sent, but it may have also contained some who did not actually receive it. *See id.* at *5-*6 & n.5. If the unproduced database turned out *not* to be overinclusive, there would be no need to look beyond it at all to identify class members. *See id.* at *6 n.5. And even if it turned out to contain some additional entries, there might still be a reliable, efficient method for identifying those who actually received faxes: the database "define[d] a limited set of potential claimants," thereby increasing the reliability of, and potentially reducing the need for, "individualized fact-finding" via affidavit. *See id.* at *6. The Third Circuit therefore remanded for the defendant to produce the database, and for the district court to determine "whether the level of individualized fact-finding" in conjunction with the database "is administratively infeasible." *Id.* Far from "clear[ly] and significant[ly] repudiat[ing]" "the Third Circuit's early ascertainability decisions" (Second Supp. BIO 3-4), *City Select* followed them.

Whatever the feasibility of identifying class members using the defendant's records in *City Select*, the Third Circuit did not eliminate its disagreement with the Ninth Circuit on facts like those in this case. Plaintiffs here sought *no* records that might

"define a limited set of potential" purchasers of Wesson Oil in eleven states over ten years, because there are none. Thus, they would leave the district court to precisely the kind of "administratively infeasible" nightmare that *City Select* and the Third Circuit's other cases forbid: "extensive and individualized" fights about years-old grocery store purchases, based entirely on unverifiable affidavits. 2017 WL 3496532, at *4, *6.

Indeed, that continued disagreement between the Third and Ninth Circuits was the whole point of Judge Fuentes' concurrence. Judge Fuentes agreed that "under [the Third Circuit's] existing precedent," the plaintiffs had to prove—and had to be given a chance to prove—"that there is a reliable and administratively feasible means to determine whether putative class members fall within the class definition." *Id.* at *7 (Fuentes, J., concurring). He wrote separately, however, to "*highlight[]* the unnecessary burden on low-value consumer class actions"—like, say, ones claiming that Wesson Oil is not "100% Natural"—"created by" the Third Circuit's ascertainability requirement. *Id.* (emphasis added). Because of that burden, he would join the "Ninth Circuit[]" in "rejecting" that requirement and instead "require only that a class be defined in reference to objective criteria." *Id.* at *11. Judge Fuentes' opinion simply makes no sense if *City Select* "sprinted" away (Second Supp. BIO 1) from the Third Circuit's position toward other circuits' views.[1]

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[1] Plaintiffs previously suggested (BIO 24; Supp. BIO 3) that the Third Circuit might take *City Select* en banc. They were right to drop the suggestion in their latest supplemental

2. Plaintiffs further insist (Second Supp. BIO 4) that "all Circuits are converging" on an answer to the problem of unidentifiable class members. This is a remarkable claim. To be sure, some circuits continue to certify sprawling, unidentifiable classes like the ones at issue here. *See Bruton v. Gerber Prods. Co.*, __ Fed. App'x __, 2017 WL 3016740 (9th Cir. July 17, 2017), at *1 (vacating the denial of a class of purchasers of off-the-shelf baby foods because it "r[an] headlong" into the decision in Conagra's case).

But whatever labels they might use, other circuits refuse to allow such classes. In just the *few months* since Conagra filed its Petition, two have vacated decisions certifying a class or affirmed the denial of class certification because of the difficulty of identifying absent class members. *See ASD Specialty Healthcare*, 863 F.3d at 472-73 (affirming

(continued…)

brief. When the Third Circuit wishes to overrule its prior precedent, it often does so *sua sponte*, before the panel issues a decision. *See, e.g.*, *Binderup v. Att'y Gen. of the U.S.*, 836 F.3d 336, 341 (3d Cir. 2016) (en banc); *Al-Sharif v. U.S. Citizenship & Immigration Servs.*, 734 F.3d 207, 209 (3d Cir. 2013) (en banc); *United States v. Quinn*, 728 F.3d 243, 250 (3d Cir. 2013) (en banc); *United States v. Caraballo-Rodriguez*, 726 F.3d 418, 420 (3d Cir. 2013) (en banc). Moreover, the panel decision in *City Select* emphasized that everyone was left guessing about the actual difficulty of identifying absent class members because the district court did not allow the plaintiff to see the database. *See* 2017 WL 3496532, at *5-*6. Plaintiffs' counsel has previously recognized that cases in which the magnitude of the problem of identifying absent class members is small or unclear are poor vehicles through which to consider ascertainability generally. *See* BIO in *Direct Digital, LLC v. Mullins*, No. 15-549 (U.S.), 2015 WL 9488470, at *1-*3

denial because the plaintiffs had "proposed no method for weeding out" those who had not received the fax in question and doing so "would undoubtedly be a difficult undertaking"); *Petrobras*, 862 F.3d at 273 (vacating certification because the court had not considered whether the plaintiffs could provide "common *answers*" about "who sold them the relevant securities, how those transactions were effectuated, and what forms of documentation might be offered" to prove plaintiffs belonged in the class because they purchased stock in a domestic issuance); *see* Petitioner's Supp. Br. 3-5.

In the meantime, just a few weeks ago, another circuit judge indicated that he would not certify these problematic classes either. In *In re Dial Complete Marketing & Sales Practices Litigation*, 312 F.R.D. 36, 48-52 (D.N.H. 2015), the district court held that ascertainability posed no barrier to eight statewide classes of those who purchased Dial Complete Foaming Antibacterial Hand Wash because the classes were objectively defined. After the classes were certified, the First Circuit denied Dial's petition for permission to appeal under Federal Rule of Civil Procedure 23(f). *See Carter*, 2017 WL 3225164, at *1.

Judge Kayatta dissented. As he pointed out, "[i]n a case involving an individual consumer, the defendant could easily challenge [the claim that a person even bought the soap], and a jury would decide whether the individual claimant was being truthful." *Id.* at *1 (Kayatta, J., dissenting from denial of petition for permission to appeal). But he "ha[d] trouble seeing how the same c[ould] be accomplished in this case, which … involve[d]

potentially hundreds of thousands of claimants." *Id.* Instead, as Judge Kayatta recognized, something would have to give: either "casual reliance on 'say-so' affidavits" would infringe upon the defendant's due process and Seventh Amendment rights, or the mini-trials needed to protect those rights would render the proceedings "[un]manageable within the meaning of Rule 23(b)(3)." *Id.* Rather than waiting and allowing "further mischief" to occur, Judge Kayatta would have intervened to bring "some modicum of rigor" to the law to block that result. *Id.*

Plaintiffs' claims of circuit "converg[ence]" (Second Supp. BIO 4) are thus false. There is no "growing consensus" (Supp. BIO 3), only chaos. This Court should intervene.

CONCLUSION

The petition should be granted.

AUGUST 18, 2017

Respectfully submitted,

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